UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

v. 15 CR 643 (PKC)

GAVIN HAMELS,

Defendant.

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New York, N.Y.
March 22, 2016
12:30 p.m.

Before:

HON. P. KEVIN CASTEL,

District Judge

APPEARANCES

PREET BHARARA
United States Attorney for the
Southern District of New York
REBECCA G. MERMELSTEIN
BRIAN R. BLAIS
AIMEE HECTOR
Assistant United States Attorneys

LEVINE LEE LLP
Attorneys for Defendant
JILLIAN B. BERMAN
DAVID LIZMI

ALSO PRESENT: Special Agent Shannon Biekiek, FBI

THE DEPUTY CLERK: United States of America v. Gavin Hamels. For the government, please?

MS. MERMELSTEIN: Good afternoon, your Honor. Rebecca Mermelstein, Brian Blais, and Aimee Hector. With us at counsel table is Special Agent Shannon Biekiek.

MS. BERMAN: Jillian Berman with my colleague David Lizmi and our client Gavin Hamels.

THE COURT: Good afternoon to you all three of you, good to see you all, and please be seated.

What I'm going to do is, I know there is a Curcio issue which I will take up, but first I want to get to the preliminary parts and get the defendant sworn.

So, Mr. Hamels, I've been advised that you wish to enter a plea of guilty to three counts of the indictment. Is that correct, sir?

THE DEFENDANT: Yes, your Honor.

THE COURT: Please be seated. Before I accept the plea of guilty from you, I must be satisfied that you understand the rights you would have if the case went to trial, and the rights you're giving up by pleading guilty. Also I must be satisfied there is a factual basis for a plea of guilty, and that you understand the consequences of pleading guilty.

In a moment I am going to have you placed under oath. I'm going to ask you certain questions, inform you of certain rights. If I ask you something or I tell you something that you don't quite understand, please let me know, and I'll put it into different words. Also, if at any time you wish to speak in private with your lawyers, Ms. Berman or Mr. Lizmi, please let me know, and I'll give you an opportunity to do so.

Do you understand all that?

THE DEFENDANT: Yes, I do.

THE COURT: Please stand and the clerk will administer the oath.

(Defendant sworn)

THE COURT: You're now under oath, and your answers to my questions are subject to the penalties of perjury or of making a false statement if you do not answer truthfully. Also, any statements you make today may be used in any such prosecution. Do you understand all that?

THE DEFENDANT: Yes.

THE COURT: How old are you, sir?

THE DEFENDANT: 39 years old.

THE COURT: How far did you go in school?

THE DEFENDANT: Master's degree.

THE COURT: In what field?

THE DEFENDANT: In business.

THE COURT: Are you now or have you recently been under the care of a medical doctor?

THE DEFENDANT: No, your Honor.

THE COURT: Have you ever been treated for a mental illness?

THE DEFENDANT: No.

THE COURT: Have you ever been addicted to any substance, prescription medications, alcohol, marijuana, anything?

THE DEFENDANT: No.

THE COURT: How do you feel today?

THE DEFENDANT: I feel good.

THE COURT: Is your mind clear?

THE DEFENDANT: Yes, it is.

THE COURT: Do you understand what's happening?

THE DEFENDANT: Yes, I do.

THE COURT: Ms. Berman, any doubt as to defendant's competence to proceed?

MS. BERMAN: No, your Honor.

THE COURT: Mr. Hamels, in this case, you are represented by Jillian Berman and Seth Levine of the law firm of Levine Lee LLP. Is that correct?

THE DEFENDANT: Yes, it is.

THE COURT: Are you aware that Ms. Berman and Mr. Levine are being assisted in this case by David Lizmi?

THE DEFENDANT: Yes, I am aware.

THE COURT: You've met Mr. Lizmi on a number of occasions?

THE DEFENDANT: That's correct.

THE COURT: Are you aware that Mr. Lizmi has applied for a position in the United States Attorney's Office for the Southern District of New York?

THE DEFENDANT: Yes, I am aware.

THE COURT: Let me tell you that, first, under the Constitution and laws of the United States, you are entitled to the effective representation of counsel. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: That has been interpreted as counsel free from any conflicts of interest. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: There is at least a potential conflict that arises out of Mr. Lizmi's application to the U.S. attorney's office, and in the following respect. Mr. Lizmi, or his colleagues, Ms. Berman and Mr. Levine, might be desirous of seeing Mr. Lizmi get hired by the U.S. attorney's office. Do you understand that?

THE DEFENDANT: Yes, I do.

THE COURT: Do you understand Ms. Berman was in the U.S. attorney's office?

THE DEFENDANT: I do.

THE COURT: I don't happen to know Mr. Levine. Was he in the U.S. attorney's office also?

MS. BERMAN: He was in the Eastern District, your Honor.

THE COURT: A foreign power, so to speak, but it is all part of the United States Department of Justice.

There could be either a conscious or unconscious desire on the part of Ms. Berman, Mr. Levine, and Mr. Lizmi, to somehow favor or benefit the government in this case in the hopes that this will advance Mr. Lizmi's application. Do you understand that?

THE DEFENDANT: I do.

THE COURT: Do you wish to be represented by Ms. Berman and Mr. Levine in this case?

THE DEFENDANT: Yes.

THE COURT: Do you wish to be represented also by Mr. Lizmi?

THE DEFENDANT: Yes, I do.

THE COURT: Let me ask you, please describe in your own words what you understand the circumstance that may amount to a conflict of interest in this case.

THE DEFENDANT: Because one of my lawyers is applying for a position in the office that is prosecuting me, his advice or my lawyers' advice may be aimed at helping them look better with the government or possibly help them secure his position, and that advice may not be in my best interest.

THE COURT: All right. Do you wish to speak with independent counsel? I can appoint a lawyer to represent you and to advise you on this conflict issue if you would like.

THE DEFENDANT: No, thank you, your Honor.

THE COURT: Ms. Berman, have you discussed this issue with your client Mr. Hamels?

MS. BERMAN: Yes, I have, your Honor.

THE COURT: Mr. Hamels, do you have any questions for me?

THE DEFENDANT: No, your Honor.

THE COURT: Do you wish to proceed with Mr. Lizmi, Ms. Berman, and Mr. Levine as your counsel in this case?

THE DEFENDANT: Yes, I do.

THE COURT: Has anyone threatened you or promised you anything to get you to say that or to waive any conflict?

THE DEFENDANT: No, your Honor.

THE COURT: Has anyone given you anything of value to get you to waive any conflict?

THE DEFENDANT: No.

THE COURT: You understand once you waive that conflict, you've waived it for all time, although you always have the right to terminate a law firm?

THE DEFENDANT: Yes, I understand.

THE COURT: You still wish to proceed with the existing counsel, is that correct?

THE DEFENDANT: That's correct.

THE COURT: Government agree there is a sufficient allocution?

MS. MERMELSTEIN: Yes, your Honor.

THE COURT: I find that the waiver of the conflict is knowing and voluntary and is accepted.

Now, have you in fact discussed the charges against you with your lawyers, Mr. Hamels?

THE DEFENDANT: Yes, I have.

THE COURT: Have you had enough time to consider all of your options in this case?

THE DEFENDANT: Yes.

THE COURT: Are you satisfied with your lawyers' representation of you?

THE DEFENDANT: Yes, I am.

THE COURT: I'm now going to explain certain rights that you would have if the case went to trial, and rights you would be giving up by pleading guilty.

Under the Constitution and laws of the United States, you are entitled to a speedy and public trial before an impartial jury on charges contained in the indictment. Do you understand that?

THE DEFENDANT: Yes, I do.

THE COURT: If there were a trial, you would not have to prove you were innocent. The government would be required to prove each element of each crime by proof beyond a reasonable doubt. Before you could be convicted, a jury of 12 people would have to agree unanimously that you were guilty.

Do you understand all of that?

THE DEFENDANT: Yes, I do.

THE COURT: If there were a trial, at every stage of the case you would be entitled to be represented by a lawyer. And if you could not afford a lawyer, one would be appointed at government expense.

Do you understand all that?

THE DEFENDANT: Yes, your Honor.

THE COURT: If there were a trial, the witnesses for the government would have to come to court to testify. You would be able to see and hear them. Your lawyer could question them through cross-examination. Your lawyer could object to evidence offered by the government. Your lawyer could present evidence and your lawyer could ask the Court to compel witnesses to appear at trial on your behalf.

Do you understand all that?

THE DEFENDANT: Yes, I do.

THE COURT: If there were a trial, you would have the right to testify if you chose to do. So you could come up here and take the witness stand. Also, you would have the right not to testify, and no one would be permitted to draw any inference or suggestion of guilt from the fact that you decided not to testify.

Do you understand all that?

THE DEFENDANT: Yes.

THE COURT: If there were a trial, and the jury found you guilty, you would have the right to appeal that finding.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Those are the rights you would have if the case went to trial. If I accept the plea of guilty from you, there will be no trial. You will proceed to the sentencing phase in which the Court will determine the punishment to be imposed upon you. Even now, you have the right to change your mind. Instead of pleading guilty, you may plead not guilty and go to trial.

Do you wish to plead not guilty and go to trial?

THE DEFENDANT: No, your Honor.

THE COURT: Do you understand Count One charges you with conspiracy to commit securities fraud from at least in or about 2009 through in or about 2011?

Do you understand that?

THE DEFENDANT: Yes, I understand.

THE COURT: Count One carries a maximum sentence of imprisonment of five years, a maximum term of supervised release of three years, a maximum fine of the greatest of $250,000, twice the gross pecuniary or financial gain derived from the offense, or twice the gross pecuniary loss to persons other than yourself as a result of the offense, and a mandatory $100 special assessment.

Do you understand all of that is the punishment that you face on Count One?

THE DEFENDANT: Yes, your Honor.

THE COURT: Count Two charges you with securities fraud from at least in or about 2009 through in or about 2011.

Do you understand that?

THE DEFENDANT: Yes, I do.

THE COURT: The punishment for Count Two, the maximum punishment is a maximum sentence of 20 years' imprisonment, a maximum term of supervised release of three years, a maximum fine of the greatest of $5 million, twice the gross pecuniary gain derived from the offense or twice the gross pecuniary loss to a person other than yourself as a result of the offense, and a mandatory $100 special assessment.

Do you understand all that?

THE DEFENDANT: Yes, I do.

THE COURT: That's the punishment on Count Two. Do you understand that?

THE DEFENDANT: Yes, your Honor.

THE COURT: Count Five charges you with investment advisor fraud from in or about June 2010 through in or about September 2010. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Count Five carries a maximum term of imprisonment of five years, a maximum term of supervised release of three years, a maximum fine of the greatest of $250,000, twice the gross pecuniary gain derived from the offense or twice the gross pecuniary loss to a person other than yourself as a result of the offense, and a mandatory $100 special assessment.

Do you understand all that?

THE DEFENDANT: Yes, I understand.

THE COURT: With respect to supervised release, you should understand there are terms and conditions attached it, and if you do not live up to them, you could be returned to prison for the whole period of supervised release.

So, say you receive a prison term to be followed by a term of three years' supervised release, and you live up to the terms of supervised release for two years, but then you violate one of the terms. You can be returned to prison for a full period of three years.

Do you understand all that?

THE DEFENDANT: Yes, I understand.

THE COURT: Are you a United States citizen?

THE DEFENDANT: Yes, your Honor.

THE COURT: Among the consequences of pleading guilty is you may give up other valuable civil rights such as the right to vote, to hold public office, to sit on a jury, to possess a firearm, to hold certain licenses, to receive certain government benefits.

Do you understand all that?

THE DEFENDANT: Yes, I understand.

THE COURT: Ms. Berman, is your client prepared to admit the forfeiture allegations in paragraphs 98 and 99 today?

MS. BERMAN: Yes, your Honor.

THE COURT: The Court must order restitution to any person who I find was injured by reason of your conduct. Do you understand that?

THE DEFENDANT: Yes, I do.

THE COURT: Are you serving any other sentence, state or federal, or being prosecuted in state court for any crime?

THE DEFENDANT: No, your Honor.

THE COURT: In sentencing you, I will receive a presentence report prepared by the office of probation that gives me background information and a recommended range of sentence under the sentencing guidelines. After hearing from your lawyer and from the government, I will make my own determination of the correct guideline range that applies in your case.

Even after determining the correct guideline range, I need not follow it, and can sentence you all the way up to the statutory maximum. The guidelines are advisory, and they're not binding on the Court. They are one of the factors that the

Court takes account of under the sentencing statute, which is commonly known as Section 3553(a).

Do you understand all that?

THE DEFENDANT: Yes, I do.

THE COURT: You will only be permitted to appeal or collaterally attack the sentence I impose on you on the basis that the sentence is unreasonable or contrary to law.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: I understand there is a plea agreement between you and the government, and that it is reflected in a document of five pages in length on the letterhead of the Department of Justice, and bearing the date of March 10, 2016.

I will ask the clerk to place it in front of the defendant.

First of all, do you have a plea agreement with the government?

THE DEFENDANT: Yes, your Honor.

THE COURT: Is that your plea agreement?

THE DEFENDANT: Yes.

THE COURT: Is that your signature on the last page?

THE DEFENDANT: Yes, it is.

THE COURT: Did you read it before you signed it?

THE DEFENDANT: Yes, I did.

THE COURT: Did you discuss it with your lawyers before you signed it?

THE DEFENDANT: Yes.

THE COURT: Did you ask questions of your lawyers before you signed it?

THE DEFENDANT: Yes, I did.

THE COURT: Did you understand it before you signed it?

THE DEFENDANT: Yes.

THE COURT: Does the agreement contain all of your understandings with the government?

THE DEFENDANT: Yes, it does.

THE COURT: Has anyone threatened you or forced you in any way to enter into the plea agreement or to plead guilty?

THE DEFENDANT: No, your Honor.

THE COURT: Has anyone given you anything of value or offered you any inducements to get you to enter into the plea agreement or to plead guilty?

THE DEFENDANT: No, your Honor.

THE COURT: I want you to know that any prediction, calculation or estimate that anyone has made to you as to what sentence I might give you is not binding on the Court, and if it turns out to be wrong, you will not be permitted to withdraw your guilty plea.

Do you understand all that?

THE DEFENDANT: Yes.

THE COURT: One of the features of your plea agreement is you have agreed to provide substantial assistance and truthful cooperation to the government. Is that correct?

THE DEFENDANT: That's correct.

THE COURT: That includes testifying if asked to do so, is that correct?

THE DEFENDANT: Yes, your Honor.

THE COURT: It is up to the government and not up to me to determine and decide whether your cooperation has been substantial enough that the prosecutors ask that I take it into account in sentencing you. I cannot second guess that decision.

But if they do ask me to take account of substantial assistance, it is up to me to decide whether to grant their request. And if I do take account of your substantial assistance, it is up to me to decide how much weight or consideration to give to it.

Do you understand all that?

THE DEFENDANT: Yes, your Honor.

THE COURT: If the government declines to make such a motion or request, or if they do but I decline to accept their recommendation or grant their motion, you will not be permitted to withdraw your plea of guilty. Do you understand all that?

THE DEFENDANT: Yes, I understand.

THE COURT: Let me hear from the government. What are the elements of the crimes charged and what in summary would be the government's proof if the case went to trial?

MS. MERMELSTEIN: Your Honor, the elements of Count One, the conspiracy charge, are: First, that two or more persons entered into an unlawful agreement; second, that the defendant knowingly and willfully joined that agreement; and third, that one of the members of the conspiracy committed at least one overt act in furtherance of some objective of that conspiracy.

The objective of the conspiracy is securities fraud, which is also charged substantively in Count Two. The elements of that offense are: First, that in connection with the purchase or sale of stock or shares in a company, the defendant did any one or more of the following:

First, employed a device, scheme, or artifice to defraud, or made an untrue statement of material fact or omitted to state a material fact which made what was said under the circumstances misleading, or engaged in an act, practice or course of business that operated or would operate as a fraud or deceit upon a purchaser or seller;

Second, that the defendant acted unlawfully, knowingly, and willfully, and with the intent to defraud; and

Third, that the defendant used or caused to be used any means or instrument of transportation or communication in interstate commerce or the use of the mails or of any facility of any national securities exchange in furtherance of the fraudulent conduct.

Count Five, which charges investment advisor fraud, has the following elements: First, that the defendant was an investment advisor;

Second, that the defendant did one of the following:

Employed a device, scheme, or artifice to defraud an actual or prospective investor advisory client; engaged in a transaction, practice, or course of business which operated as a fraud and deceit upon those investment advisory clients or prospective investment advisory clients; or engaged in an act, practice, and course of business that was fraudulent, deceptive, and manipulative;

Third, that the defendant devised or participated in such alleged device, scheme or artifice to defraud or engaged in such alleged transactions, practice, or course of business knowingly, willfully, and with the intent to defraud; and

Fourth, that the defendant employed such alleged device, scheme or artifice to defraud or engaged in such alleged transaction, practice, or course of business by use of the mails or an instrumentality of interstate commerce.

If the case proceeded to trial, the government would prove through documentary evidence and witness testimony that in or about 2010, Mr. Hamels was an investment advisor at SunTrust. That after an investment in many client accounts became illiquid, Mr. Hamels agreed with others to conceal the problem from investors.

In particular, he agreed with Jason Galanis and others to use investor money to purchase shares of Gerova, a publicly traded company. In return, Galanis agreed to provide both liquidity and cash for certain clients, and to provide two other stocks for free that would pad customer accounts. Mr. Hamels did not disclose to clients that the receipt of these free shares was contingent on the purchase of Gerova.

Mr. Hamels coordinated his purchase of the shares of Gerova with sales by others, knowing that doing so, engaging in the matched trading, would have the effect of creating a false impression of trading volume, among other things.

Gerova traded on the AmEx and later on the New York Stock Exchange. At various times relevant to the charges here, the New York Stock Exchange servers were located in the Southern District of New York. In addition, Gerova held its board meetings in the Southern District of New York, and other co-conspirators committed overt acts in the Southern District of New York, including, for example, a fraudulent letter mailed by a co-defendant to the New York Stock Exchange.

THE COURT: Mr. Hamels, please tell me in your own words what you did that leads you to believe that you are guilty of the crime charged.

THE DEFENDANT: Yes, your Honor.

In 2010, I was working as an investment advisor at SunTrust Bank. After an investment owned by some of our clients became illiquid, I agreed with others to engage in a transaction in order to distract clients from possible losses in the illiquid fund and prevent client departures.

Specifically, I agreed to purchase on behalf of SunTrust clients securities in Gerova, a publicly traded stock on the AmEx and later the New York Stock Exchange, in exchange for both other stock that could be provided to clients that might have long-term value as well as a liquidity pool for SunTrust clients.

I then purchased Gerova Securities on behalf of SunTrust clients in a coordinated fashion. I understood that by coordinating these trades with others, it had the effect of creating an artificial and misleading perception of market activity in Gerova, and in particular, that it boosted the appearance of trading volume and liquidity in Gerova. Also, I knew I was misleading SunTrust clients by not telling them certain aspects of this transaction that I believed they would have wanted to know. I knew what I was doing was wrong.

THE COURT: Government agree there is a sufficient factual predicate for a plea of guilty to Counts One, Two and Five?

MS. MERMELSTEIN: Yes, your Honor.

THE COURT: Ms. Berman, does the defendant have any basis to challenge the venue proffer that has been made by the government?

MS. BERMAN: No, your Honor.

THE COURT: Mr. Hamels, do you have any questions for me?

THE DEFENDANT: No, I do not, your Honor.

THE COURT: With regard to Count One of the indictment, how do you plead, guilty or not guilty?

THE DEFENDANT: Guilty.

THE COURT: With regard to Count Two of the indictment, how do you plead, guilty or not guilty?

THE DEFENDANT: Guilty.

THE COURT: With regard to Count Five of the indictment, how do you plead, guilty or not guilty?

THE DEFENDANT: Guilty.

THE COURT: With regard to the forfeiture allegations in paragraphs 98 and 99 of the indictment, do you admit those allegations or deny those allegations?

THE DEFENDANT: Yes, I admit those, your Honor.

THE COURT: In your plea agreement, you waived your right to appeal based on any failure of the government to have produced any discovery material or other material that it was required to disclose, including exculpatory material or impeachment material.

Do you understand that?

THE DEFENDANT: Yes, your Honor.

THE COURT: Based upon your responses to my questions and my observations of your demeanor, I find that you know your rights, you know the consequences of pleading guilty, and there is a factual basis for your plea of guilty. Your plea of guilty and your admission of the forfeiture allegations is accepted. Further, I find that your plea agreement was knowingly and voluntarily entered into. You may be seated.

There will be no presentence investigation in the near future. But there will eventually be, and I order that no interview of you take place unless your counsel is present. It is important to be truthful and honest with the folks who prepare the presentence report. Tell them the good things, even the not-so-good things.

You'll have the opportunity to review that report before the date of sentencing. If there are any mistakes, point them out to your lawyer so she can point them out to me.

A control date for sentencing is set for January 6, 2017 at 10 a.m. Any objection to bail continuing to the date of sentence?

MS. MERMELSTEIN: No, your Honor.

THE COURT: That's granted. And any other applications?

MS. MERMELSTEIN: Not from the government.

MS. BERMAN: No, your Honor. Thank you.

THE COURT: Is there any application with regard to the sealing of this proceeding?

MS. MERMELSTEIN: No, your Honor.

THE COURT: Okay. Then we are adjourned. Thank you all very much. Good to see you all. Thank you.

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